

NORTHWEST ENVIRONMENTAL ADVOCATES



July 10, 2015

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER

U.S. Environmental Protection Agency
National Freedom of Information Office
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Filed via FOIA Online

Re: **National Endangered Species Act Consultation on Clean Water Act Section 304(a) National Recommended Cyanide Criteria**

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a regional non-profit environmental organization founded in 1969 and dedicated to preserving and protecting natural resources in the Northwest and the nation. NWEA works through advocacy, litigation, and education to protect and restore water and air quality, wetlands and wildlife habitat. NWEA has a long history of interest and involvement in environmental issues in the Northwest and the nation, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This request concerns EPA's consultation pursuant to Section 7(a) of the Endangered Species Act on the Clean Water Act 304(a) national recommended criteria for cyanide.

I. FOIA Request

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not

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expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide:

1. All formal communications between the Environmental Protection Agency (EPA) and the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service (FWS) regarding consultation pursuant to Section 7(a) of the Endangered Species Act (ESA) on the Clean Water Act 304(a) national recommended criteria for cyanide (e.g., signed letters and their attachments, biological assessments/evaluations, draft biological opinions);
2. Any compilations (e.g., lists, charts, tables, data bases), *if any*, of EPA approvals of state water quality standards submissions of aquatic life criteria for cyanide that have referred, deferred or otherwise cited to the national ESA consultation on cyanide in lieu of initiating or completing ESA consultation on state submissions of new or revised water quality standards;
3. All documents prepared or used by, in the possession of, or routed through the EPA related to: EPA, NMFS, and/or FWS's failure to have completed the ESA consultation on the national recommended criteria for cyanide; and
4. Any EPA documentation that its approval or planned approval of state water quality standards submissions including aquatic life criteria for cyanide referred, deferred, or otherwise cited to the national consultation on cyanide—such as cover letters, decision documents, memoranda to files/records, letters to NMFS, FWS or a state—that were not included in the following previous or pending FOIA responses, *if any*:
 - All conditional approvals of water quality standards submissions since 1993 to March 14, 2013 (HQ-FOI-01732-11);
 - All Region 1 approvals of water quality standards from 2000 to 2013 (EPA-R1-2013-008330);
 - All Region 2-10 approvals of water quality standards from March 14, 2013 to June 15, 2015 (EPA-HQ-2015-007250);
 - All Region 1 approvals of water quality standards from July 17, 2013 to June 15, 2015 (EPA-HQ-2015-007250); and
 - All state submissions upon which EPA is withholding approval action because it is in the process of consulting but in which it has already referred, deferred, or otherwise cited the national consultation on cyanide as a reason to not consult on aquatic life cyanide submissions (currently pending partial release pursuant to EPA-HQ-2015-007250).

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

As is discussed below, NWEA is involved in litigation regarding water quality standards. Use of information sought through FOIA is a recognized public use and benefit under FOIA’s fee waiver standard. Courts have long recognized that the use of such laws to further the public interest through challenges to agency action may actually represent some of the highest and best application of public access laws. For example, the Ninth Circuit has ruled that a FOIA requester established a *prima facie* justification for a fee waiver when “[i]n particular, they made it clear to [the agency] that they meant to challenge publicly the scientific basis for the western pond turtle listing denial.” *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir.1997); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975) (evidence of prior litigation interest does not decrease right of access under FOIA). Indeed, almost 30 years ago, the federal court for the District of Columbia, citing Supreme Court precedent, ruled that “[l]itigation to seek redress of violation of law is a right established by the first amendment . . . and restrictions thereupon are subject to strict scrutiny.” *Idaho Wildlife Fed’n v. U.S. Forest Serv.*, Civ. No. 82-1206 (D.D.C. July 21, 1983) (citing *NAACP v. Button*, 371 U.S. 415 (1962)), Slip Op. at 7. In that case, the court rejected the Forest Service’s denial of a fee waiver request because it relied on a regulation that proscribed such waivers whenever the information was “sought for use in litigation against the federal government.” *Id.* at 3. The court ruled that such a proposition is “untenable” because:

The concept of the “private attorney general” is well-established, and certainly had its genesis in the environmental field. Indeed, when private litigation against a government agency vindicates a significant public policy and creates widespread benefit, policy en-courages such litigation by awarding the plaintiff attorney’s fees and costs.

Id. at 8 (citation omitted). The court noted that the Idaho Wildlife Federation “is a non-profit organization which states that its purpose in litigation against the Forest Service is to ensure compliance with environmental laws” and that “such activity would appear to be of the type generally considered to be public interest.” *Id.* Because policy-based disputes with agencies, as well as administrative challenges, “cannot be done completely without the ability to seek judicial review,” the court enjoined the Forest Service’s broad-brush rejection of fee waiver requests simply because they might interfere with an agency’s unfettered pursuit of its agenda. *Id.* at 8-9. Indeed, litigation to enforce federal laws is an essential function of organizations, such as and including NWEA, which act in a watchdog capacity.

A. Whether the subject of the requested records concerns “the operations or activities of the government.”

This request concerns documents in the possession of EPA regarding ESA consultation on state

submissions of water quality standards and on a proposed method to address the requirement to consult pursuant to the ESA—the national consultation. EPA has been known in several instances to “defer” or “refer” to the national consultation in lieu of conducting consultation on a state submission. Yet there is no evidence that the national consultation will ever be completed. EPA’s actions or decisions to not complete consultation at the national level on which it is depending for approvals of state submissions of cyanide criteria concerns the operations of the government because such consultation is mandatory under the ESA. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the U.S. EPA to engage in or forego ESA consultation on submitted water quality standards rules and EPA’s actions or inactions that have resulted in no federal government completion of national consultation.

B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

EPA’s formal actions on state water quality standards are sometimes available on EPA’s websites. Frequently they are not. Regardless, in almost no cases does EPA post material and information pertaining to ESA consultation on its approvals of state water quality standards. There is no information available on EPA’s failure attempt to complete national consultation on cyanide criteria. Without access to EPA records there is no mechanism by which the public can gain insight into the protectiveness of state rules that EPA has approved. Accordingly, the disclosure of records that will indicate what has happened and not happened with regard to the national consultation will demonstrate the degree to which EPA has acted outside the law by not obtaining the expert opinions of the fish and wildlife agencies on approvals of state water quality standards for cyanide. This information is essential to the public understanding what water quality standards are sufficiently protective of the designated uses. In addition, without access to records, should they exist, to demonstrate what action, if any, EPA has initiated under the ESA on its approval of states’ standards, the public has no way of knowing whether EPA has complied with the requirements of that law. Similarly, without access to these records, NWEA cannot evaluate whether EPA has initiated consultation that has not been completed by the Services. Without these records, NWEA cannot evaluate where EPA has taken actions that were, at the time, considered by EPA to be conditional upon future completion of ESA consultation.

Release of the requested records will allow the public to understand what action EPA has taken to complete the national consultation.

For this reason, reviewing records of EPA’s action or inaction will be “meaningfully informative” and is therefore likely to contribute to an understanding of whether EPA’s approach to national consultation is a legitimate replacement for a mandatory duty to consult on EPA approvals of state water quality standards submissions. Having such information is also “meaningfully informative” in that it ensures NWEA and other organizations do not engage in frivolous or unfounded litigation.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the

information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as the State of Florida,, to assist them by conveying our understanding of EPA policies and provide EPA documents. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. In the past, NWEA has shared similar information with state agencies, federal employees, tribal governments, and the press, as well as representatives of municipal and industrial dischargers. NWEA will continue to share such records as well as information analyzed from records with this same list of interests.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means, as appropriate: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, in litigation, on its website, through internet file sharing programs, and through formal public comments and other formal documents prepared for agencies.

NWEA's investigation and evaluation of the records will be made available to other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, TMDL development, and permit issuances, all of which occur regularly and depend upon water quality standards. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's decision-making. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the Clean Water Act and ESA.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes and litigation that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, file sharing programs, and through its website.

D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). The requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S.*

Dept. of Interior, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver). Almost no information on ESA consultation is available to the public without special requests and this is particularly true with regard to this experimental national consultation. Moreover, there is no way, short of a FOIA request, to ensure that all the publically available documents are the universe of documents pertaining to this subject matter.

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as in some of the fee waiver requests addressed in this appeal, the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of EPA in light of its actions and inactions pursuant to the CWA and ESA. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation. NWEA also participates in matters of EPA national policy, in areas such as standards and TMDLs. It also shares documents and information with other organizations that engage in those activities. NWEA will also disseminate the information to organizations through listserves, websites, meetings, memoranda, and direct sharing of the records as appropriate. Only by understanding the EPA's actions and inactions can NWEA meaningfully participate in its public oversight watchdog function and assist other organizations

to do the same.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request just as it did with its previous identical request.

We look forward to your response. Please feel free to contact me at 503/295-0490 if you have any questions about how to respond to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized flourish at the end.

Nina Bell
Executive Director